(2) (2) (2)

Nos. 90-785, 90-931, and 90-937

In the Supreme Court of the United States

OCTOBER TERM, 1990

STANLEY SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

MARIO BIAGGI, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD BIAGGI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether two counts charging petitioner Simon with extortion and tax evasion were properly joined with other counts in the indictment.

2. Whether there was a disparity between the allegations in the indictment and the proof at trial concerning the date of an extortionate demand by petitioner Simon that constituted an impermissible amendment of the indictment.

3. Whether the court of appeals was correct in concluding that the erroneous inclusion of certain language in the jury instruction on extortion did not prejudice petitioner Simon.

4. Whether the district court properly denied petitioner Simon's motion for a new trial, which was based on new evidence suggesting that a government witness had understated the extent of his admitted tax evasion.

5. Whether the district court properly denied petitioner Mario Biaggi's request for the discovery of certain documents and the issuance of certain trial subpoenas.

6. Whether the district court correctly excluded evidence of petitioner Mario Biaggi's state of mind, after Biaggi withdrew the proffer of evidence.

7. Whether the district court properly found that the government made no use of immunized testimony given by petitioner Richard Biaggi before a state grand jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Kastigar v. *United States*, 406 U.S. 441 (1972)	20
United States v. *Agurs*, 427 U.S. 97 (1976)	16
United States v. *Attanasio*, 870 F.2d 809 (2d Cir. 1989)	11, 12, 13
United States v. *Balk*, 706 F.2d 1056 (9th Cir. 1983)	19
United States v. *Begnaud*, 783 F.2d 144 (8th Cir. 1986)	12
United States v. *Coppola*, 788 F.2d 303 (5th Cir. 1986)	11
United States v. *Gilbert*, 668 F.2d 94 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982)	16
United States v. *Gonzalez*, 748 F.2d 74 (2d Cir. 1984)	16
United States v. *Heimann*, 705 F.2d 662 (2d Cir. 1983)	13
United States v. *Kenny*, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981)	11
United States v. *Leibowitz*, 857 F.2d 373 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989)	13
United States v. *Miller*, 471 U.S. 130 (1985)	12
United States v. *Nersesian*, 824 F.2d 1294 (2d Cir.), cert. denied, 484 U.S. 957 (1987)	13

Cases—Continued: Page

United States v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984) 14
United States v. *Petrillo*, 821 F.2d 85 (2d Cir. 1987) 16
United States v. *Paiz*, 905 F.2d 1014 (7th Cir. 1990) 19
United States v. *Steel*, 759 F.2d 706 (9th Cir. 1985) 16
United States v. *Turoff*, 853 F.2d 1037 (2d Cir. 1988) 10, 11
United States v. *Weiss*, 752 F.2d 777 (2d Cir.), cert. denied, 474 U.S. 944 (1985) 12

Constitution, statutes, regulation and rules:

U.S. Const. Amend. V 12
15 U.S.C. 637(a)(4)(A)(i)(I) 8
15 U.S.C. 637(a)(5) 8
18 U.S.C. 201(c) (1982) 2
18 U.S.C. 201(g) (1982) 2
18 U.S.C. 1001 2
18 U.S.C. 1341 2
18 U.S.C. 1623 3
18 U.S.C. 1951 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
26 U.S.C. 7206(1) 3
13 C.F.R. 124.105(b) 8
Fed. R. Crim. P.:
Rule 8(a) 10
Rule 8(b) 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-785

STANLEY SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 90-931

MARIO BIAGGI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 90-937

RICHARD BIAGGI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 36-142)[1] is reported at 909 F.2d 662. The opinions of the district court denying petitioner Simon's motions for severance and

---

[1] "Pet. App." refers to the appendix to the petition in No. 90-785.

mistrial (Pet. App. 145-184, 185-221) are reported at 672 F. Supp. 112 and 705 F. Supp. 852. Other district court opinions are reported at 674 F. Supp. 1034, 675 F. Supp. 790, and 705 F. Supp. 790, 830, 848, 864, and 867.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1990. A petition for rehearing in No. 90-785 was denied on July 30, 1990. Pet. App. 143-144. A petition for rehearing in No. 90-931 was denied on September 10, 1990. 90-931 Pet. App. 71a-73a. The petition for a writ of certiorari in No. 90-785 was filed on October 29, 1990. The petitions for a writ of certiorari in No. 90-931 and No. 90-937 were both filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners and three others were convicted on various charges arising out of the affairs of the Wedtech Corporation, a manufacturing company that received defense contracts. Petitioners Mario Biaggi and Stanley Simon were each convicted of participating in and conspiring to participate in the affairs of the Welbilt Electronic Die Corporation (later known as the Wedtech Corporation) through a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c) and (d) (Counts 1 and 2). Mario Biaggi was also convicted on two counts of extortion, in violation of 18 U.S.C. 1951 (Counts 3 and 10), two counts of bribery, in violation of 18 U.S.C. 201(c) (1982) (Counts 4 and 11), one count of receiving a gratuity, in violation of 18 U.S.C. 201(g) (1982) (Count 5), two counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 6 and 12), three counts of making false statements, in viola-

tion of 18 U.S.C. 1001 (Counts 7, 8, and 9), two counts of filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 14 and 15), and one count of perjury, in violation of 18 U.S.C. 1623 (Count 18). Simon was also convicted on three counts of extortion (Counts 19-21), one count of perjury (Count 22), and one count of tax evasion (Count 23). Petitioner Richard Biaggi was convicted on one count each of aiding and abetting bribery (Count 4), receiving a gratuity (Count 5), and mail fraud (Count 6), and on two counts of filing false tax returns (Counts 16 and 17).

Mario Biaggi was sentenced to a total of eight years' imprisonment and a $242,000 fine. Simon was sentenced to a total of five years' imprisonment and a $70,000 fine. Richard Biaggi was sentenced to a total of two years' imprisonment and a $71,000 fine. Pursuant to agreements between the government and certain of the defendants, the district court also entered judgments of forfeiture for $350,000 against Mario Biaggi and $25,000 against Simon. The court of appeals affirmed on all the counts on which Mario Biaggi and Simon were convicted; it reversed Richard Biaggi's convictions on Counts 4, 5, and 6 and dismissed those counts; and it remanded the remaining counts against Richard Biaggi for resentencing. Pet. App. 142; Gov't C.A. Br. 256-263.[2]

---

[2] Co-defendant John Mariotta was convicted on both RICO counts, two counts of mail fraud, four counts of tax evasion, and three counts of bribery. He was sentenced to a total of eight years' imprisonment and a $291,000 fine. A judgment of forfeiture was entered against him for $11,700,000. The court of appeals affirmed his mail fraud and tax convictions, and reversed his convictions on the RICO and bribery counts; those counts were remanded for a new trial.

Co-defendant Bernard Ehrlich was convicted on both RICO counts, two counts of extortion, two counts of mail fraud, three counts of bribery, and two counts of receiving a gratuity. He was sentenced to

1. The evidence adduced at trial, the sufficiency of which is not now in dispute, is summarized in the opinion of the court of appeals. It established that the company later known as Wedtech was a small sheet metal fabricating company located in the South Bronx area of New York City. It was founded by petitioners' co-defendant John Mariotta, who is of Puerto Rican descent. In 1975, Wedtech was accepted into the Small Business Administration's "Section 8(a)" program, under which minority-owned businesses are eligible for government contracts without competitive bidding. Pet. App. 59.

In 1978, petitioner Mario Biaggi, then a congressman from the Bronx, met Mariotta and Fred Neuberger, a co-owner of Wedtech. Biaggi was at that time a partner in the law firm of Biaggi & Ehrlich, which was retained by Wedtech for an annual retainer of $20,000. The retainer was later increased in stages to $150,000. Biaggi withdrew as a member of the law firm in 1979, after the House of Representatives adopted a rule limiting its members' outside income. The law firm bought Biaggi's interest in the firm for $320,000, payable over ten years; he remained in an "of counsel" relationship to the firm. Biaggi's son, petitioner Richard Biaggi, became a partner in the firm in 1983. Pet. App. 59-60.

Starting in 1978, Mario Biaggi contacted various government officials on behalf of Wedtech, urging that Wedtech

---

six years' imprisonment and a $222,000 fine. He was also ordered to forfeit $350,000. The court of appeals affirmed each of his convictions.

Co-defendant Peter Neglia was convicted on the substantive RICO count, and one count each of bribery, receipt of a gratuity, and obstruction of justice. He was sentenced to three years' imprisonment and a $30,000 fine. His RICO conviction was reversed and dismissed, and the bribery and obstruction of justice counts were remanded for resentencing.

None of these co-defendants has filed a petition for a writ of certiorari.

be awarded defense contracts through the SBA's Section 8(a) program and loans from the Economic Development Administration. Wedtech also benefited from the services of attorney E. Robert Wallach (who frequently contacted White House ~~Chief~~ official Edwin Meese on Wedtech's behalf), former White House assistant Lyn Nofziger, and other Washington lobbyists. Pet. App. 60.

In 1982, Wedtech was awarded a $27 million contract to make small engines for the Army, and in 1984 Wedtech was awarded a $24 million contract to make pontoons for the Navy. Despite these contracts, Wedtech experienced serious financial difficulties and filed for bankruptcy at the end of 1986. Pet. App. 60-61.

The evidence against petitioners and their co-defendants came primarily from four Wedtech officials, Fred Neuberger, Mario Moreno, Lawrence Shorten, and Anthony Guariglia, who all pleaded guilty to various offenses arising from their own activities at Wedtech and who testified pursuant to grants of use immunity. Pet. App. 61. The court of appeals grouped the evidence into six categories, four of which are particularly relevant to petitioners' convictions: (1) the five percent stock interest; (2) the $50,000 Loop Drive payment; (3) the benefits to Simon; and (4) the Section 8(a) fraud.[3]

a. *The Five Percent Stock Interest*. In 1983, Wedtech made a public offering of its stock. At that time, the company issued two and one-half percent of its stock to Bernard Ehrlich and an equal percentage to Richard Biaggi. The government's evidence showed that Richard was given his shares as a nominee for his father, that the total five percent stock interest was paid to influence Congressman

---

[3] The other two categories were a slush fund used by Mariotta and other Wedtech officials, Pet. App. 71-72, 126-127, and the bribery of SBA official Peter Neglia, *id.* at 72-73, 102-105.

Biaggi to use the power of his office to help secure government contracts for Wedtech, and that the payment was made in response to an extortionate demand by Congressman Biaggi, aided by Ehrlich. Both Ehrlich and Richard Biaggi later sold about one-third of their stock, each realizing more than $600,000. Pet. App. 61-62; Gov't C.A. Br. 19-20, 24-27.[4]

b. *The $50,000 Loop Drive Payment.* After Wedtech obtained the contract to make pontoons for the Navy, it needed a waterside property for testing the vessels. The company identified a site known as One Loop Drive in the Bronx, a property owned by the city of New York. In order to obtain a lease from the city, Ehrlich sought the help of petitioner Stanley Simon, then the Bronx Borough President and a member of the Board of Estimate, which was responsible for approving city leases. Simon arranged for Wedtech officials to meet with the appropriate city official, and Ehrlich negotiated a three-year lease for Wedtech at a price well below what the city had originally requested. After the lease was negotiated, in June 1984, it had to be approved by the Board of Estimate. Wedtech needed prompt approval in order to satisfy the terms of its contract with the Navy, but the matter failed to pass at the Board's June 13 meeting and was deferred until the July meeting. Mario Biaggi called Simon and demanded his assistance in having the lease approved at the next meeting. The Board approved the lease at its July 12 meeting. Pet. App. 62-63; Gov't C.A. Br. 33-34.

---

[4] The court of appeals found ample evidence to establish that the stock was held by Richard Biaggi for his father, but it found insufficient evidence that Richard was aware of the unlawful nature of the transaction. It therefore reversed Richard's convictions on Counts 4, 5, and 6 (aiding and abetting bribery, gratuity, and mail fraud), but let stand his convictions for filing false tax returns. Pet. App. 88-94.

On July 13, Wedtech paid Ehrlich's law firm $50,000 for "Ports and terminal matter. Services rendered June 1984." The evidence supported the conclusion that the $50,000 was a bribe to Mario Biaggi to induce him to use his official position to secure approval for the Loop Drive Lease, and a payment in response to extortionate demands by Mario Biaggi. Pet. App. 63-64, 99-102.

c. *Benefits to Simon.* Neuberger testified that, at a benefit function at the Yonkers racetrack, Simon made an extortionate demand for $50,000 in connection with the Loop Drive lease. Simon told Neuberger that he needed help with his reelection campaign, and that he expected $75,000 or $100,000. Neuberger objected that it was illegal for a corporation to make a campaign contribution. Simon suggested making the payment in the form of donations to various charitable organizations and "some other expenses." They agreed on a figure of $50,000.[5] Neuberger then gave instructions to a Wedtech employee to release a total of $50,000 from a Wedtech account for purposes that Simon would later indicate to her. Ultimately, the major expenditures were $20,000 in charitable contributions to two synagogues, $10,000 as a political contribution to "Friends of Simon," and $10,000 in cash. The Wedtech employee gave the $10,000 in cash in a sealed envelope to Ralph Lawrence, Simon's assistant in the Bronx Borough President's office, and Lawrence gave the unopened envelope to Simon. Pet. App. 64-66; Gov't C.A. Br. 34.

---

[5] Neuberger testified that the Yonkers racetrack meeting occurred in June 1984. Another Wedtech employee placed the meeting in November 1984. In the defense case, Simon introduced evidence that he had met Neuberger at the Yonkers racetrack in November 1984, not June 1984. In its summation, the government stated that the meeting at the Yonkers racetrack "probably" took place in November 1984. Pet. App. 64-65, 114; Gov't C.A. Br. 190.

Simon received three other unlawful benefits, one of which was paid by Wedtech. First, after Ehrlich told Moreno that Simon wanted Wedtech to hire Henry Bittman, Simon's brother-in-law, Wedtech hired Bittman as a payroll clerk and eventually raised his salary to $35,000. Wedtech employees testified that Bittman's work was unsatisfactory but that he was kept on the payroll because of a promise to Simon. Pet. App. 67; Gov't C.A Br. 14, 35. Second, after Simon's assistant Ralph Lawrence received a salary increase, Simon demanded one-half of all of Lawrence's subsequent salary increases as a kickback. Over the next three and one-half years, as Lawrence's salary rose to approximately $52,000, he provided half of his salary increases to Simon, for a total of about $14,000, in the form of cash, goods, and services. Pet. App. 68; Gov't C.A. Br. 43. Third, after Simon introduced Sabino Fogliano, a Bronx contractor, to various New York City officials, Fogliano complied with Simon's request to supply approximately $9,000 worth of marble and tile work for Simon's home. Fogliano never billed Simon for the work because he knew he would not be paid. Pet. App. 69; Gov't C.A. Br. 44-45.

d. *The Section 8(a) Fraud.* A company qualifies for the SBA's Section 8(a) program if it is at least 51 percent owned by "one or more socially and economically disadvantaged individuals" (15 U.S.C. 637(a)(4)(A)(i)(I)), a category that includes Hispanic Americans (15 U.S.C. 637(a)(5); 13 C.F.R. 124.105(b)). Pet. App. 70. Mariotta, who is of Puerto Rican descent, and his partner Neuberger sought to qualify Wedtech for the Section 8(a) program. To do so, they created false documents to make it appear that Mariotta owned two-thirds of Wedtech's stock, although in fact each of the two men owned half. Pet. App. 70; Gov't C.A. Br. 10.

When Wedtech became a public corporation, Mariotta and other individuals (including Mario Biaggi) devised

fraudulent stock purchase agreements to make it appear that Mariotta retained an ownership interest of over 50 percent in the company. Insiders who had received stock purported to assign their interests to Mariotta, who was obligated to pay for the shares over a ten-year period; upon Mariotta's failure to pay, the shares would revert to the insiders. Mariotta verbally agreed not to make the payments, thereby ensuring that the insiders would retain their interests in the company. Pet. App. 70-71, 111-112, 126-127; Gov't C.A Br. 28-31.

2. The court of appeals addressed a broad range of claims raised by petitioners and their co-defendants. Pet. App. 36-142. The court rejected Simon's claims that two counts were misjoined (*id.* at 75-79); that the indictment was constructively amended at trial with respect to the $50,000 extortion from Wedtech (*id.* at 115 n.10); and that the district court's extortion instruction required reversal (*id.* at 133-138). The court also considered and rejected Mario Biaggi's claims that he was unfairly denied discovery of certain documents and the issuance of certain trial subpoenas (*id.* at 131-133) and that he was erroneously denied permission to introduce state of mind evidence regarding the issuance of Wedtech shares to Richard Biaggi (*id.* at 129-131). Finally, the court considered and rejected Richard Biaggi's claim that he was entitled to a hearing concerning the claimed use of immunized testimony that he had given to a state grand jury. *Id.* at 115-119.

ARGUMENT

1. Petitioner Simon maintains (90-785 Pet. 12-20) that two counts against him, Counts 21 and 23, were improperly joined with the other counts. Count 21 charged Simon with extorting from Ralph Lawrence, his assistant in the Bronx Borough President's office, half of Lawrence's salary

increases. Count 23 charged Simon with tax evasion for the year 1985, based on his failure to report the $50,000 in benefits from Wedtech, the salary kickbacks from Lawrence, and the $9,000 of tilework from Sabino Fogliano.

The district court originally denied Simon's severance motion (Pet. App. 180-183) on the authority of Rule 8(a) of the Federal Rules of Criminal Procedure, which provides that two or more offenses may be joined if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." During the trial of this case, the court of appeals decided *United States* v. *Turoff*, 853 F.2d 1037 (2d Cir. 1988), holding that, if a misjoinder claim is made based on multiple defendants and multiple offenses, it should be analyzed under Rule 8(b), which governs joinder of defendants.[6] Simon then moved for a mistrial, reasserting his misjoinder claim. The district court denied the motion. Pet. App. 185-221. It determined that, even after *Turoff*, Rule 8(a) remains the appropriate provision when, as here, a defendant in a multiple-defendant case objects to joinder of counts in which he alone is charged. Pet. App. 191-195. But the court also specifically decided that, even if Rule 8(b) were applicable, joinder was proper. Pet. App. 191, 197, 217-221.

Without resolving the question whether Rule 8(a) might properly apply in these circumstances, the court of appeals

---

[6] Fed. R. Crim. P. 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

agreed with the district court that joinder was proper even under Rule 8(b). Pet. App. 75-78. Petitioner's objection thus does not go to the proper legal standard; rather, it goes only to the application of Rule 8(b) to the facts of this case. This case-specific application of the Rule does not warrant review.

In any event, the courts below were correct in their application of the Rule. With regard to Count 21, although Simon's extortion of Lawrence involved a different victim, the extortion of Lawrence and the extortion of Wedtech were part of the "same series of acts or transactions." Fed. R. Crim. P. 8(b). As the court of appeals explained, Simon used Lawrence as the means of obtaining benefits from Wedtech (particularly the $10,000 payment), and "[p]roof of one scheme was helpful to a full understanding of the other." Pet. App. 77; see also *id.* at 214-221. Thus there was a sufficient relatedness of facts and participants to fulfill the "same series" requirement of Rule 8(b). *United States* v. *Attanasio*, 870 F.2d 809, 814-815 (2d Cir. 1989); *United States* v. *Turoff*, 853 F.2d at 1044.

With regard to Count 23, the core of the tax count concerned the unreported income extorted from Wedtech and from Lawrence. Pet. App. 78, 197. As to those sources, joinder was clearly appropriate. See *United States* v. *Turoff*, 853 F.2d at 1043 ("The most direct link possible between non-tax crimes and tax fraud is that funds derived from non-tax violations either are or produce the unreported income."); *United States* v. *Coppola*, 788 F.2d 303, 306-307 (5th Cir. 1986); *United States* v. *Kenny*, 645 F.2d 1323, 1344 (9th Cir.), cert. denied, 452 U.S. 920 (1981). As the court of appeals observed, moreover, since a tax count deals with all taxes evaded on a single year's income, it also was not error to join the tax count simply because it included the "relatively small amount of income from the unrelated trans-

action involving Fogliano." Pet. App. 78. Accordingly, Simon's motion for a severance was properly denied.

2. Petitioner Simon also contends (90-785 Pet. 30-34) that the proof at trial concerning his extortion of Wedtech produced an impermissible amendment of the indictment. His claim relates exclusively to the date on which he made an extortionate demand of Wedtech official Neuberger for $50,000 in exchange for Simon's influence on behalf of the Loop Drive lease. Count 1 alleged that Simon's demand for $50,000 occurred "[i]n or about mid-1984." C.A. App. A155. Count 1 also alleged, in Racketeering Act 4, that Simon extorted the money "[b]eginning in or about mid-1984 and continuing up to and including early 1986." C.A. App. A166. Count 19, the substantive extortion count concerning the $50,000, similarly alleged that the extortion occurred "[b]eginning in or about mid-1984 and continuing up to and including early 1986." C.A. App. A196. Although Neuberger testified that Simon first made the extortionate demand at the Yonkers Raceway in June 1984, the government ultimately acknowledged, on the basis of other evidence, that the Yonkers racetrack meeting "probably" occurred in November 1984. See note 5, *supra*. Simon argues that the government thereby constructively amended the indictment, in violation of the Fifth Amendment. The court of appeals correctly rejected this argument.

As the court of appeals concluded (Pet. App. 115 n.10), the evidence that the demand was made in November did not reflect a modification of an essential element of the offense, and thus did not amount to an amendment of the indictment. See *United States* v. *Miller*, 471 U.S. 130, 136, 138-140 (1985); *United States* v. *Attanasio*, 870 F.2d at 817; *United States* v. *Begnaud*, 783 F.2d 144, 147 & n.4 (8th Cir. 1986); *United States* v. *Weiss*, 752 F.2d 777, 787 (2d Cir.), cert. denied, 474 U.S. 944 (1985). Simon was convicted of the offense charged in the indictment, extortion under

color of official right. The evidence showed the participants, the victim, and the nature of the extortionate scheme to be precisely those charged in the indictment. Although there was a difference between Neuberger's testimony and the defense evidence regarding the date of the meeting between Neuberger and Simon, the date on which an extortion occurs is not an essential element of a federal extortion offense. See *United States* v. *Leibowitz*, 857 F.2d 373, 379 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989); *United States* v. *Heimann*, 705 F.2d 662, 665-666 (2d Cir. 1983).[7]

As the court of appeals concluded, the discrepancy in the proof regarding the date of Simon's demand did not result in an amendment of the indictment. Pet. App. 115 n.10. Indeed, the language of the indictment, alleging that the extortion took place "in or about mid-1984," and that it continued into 1986, was broad enough to cover an initial demand occurring either in June or November 1984. Although the evidence showed that the date of the offense was probably later than the government witness recalled, there was no doubt as to the nature of the offense charged, and Simon could not have been misled as to the nature of the charge against him as a result of the confusion as to the date of the meeting. Petitioner's claim thus is not meritorious. *United States* v. *Attanasio*, 870 F.2d at 817; *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), cert. denied, 484 U.S. 957 (1987); *United States* v. *Heimann*, 705 F.2d at 666-667.

3. Petitioner Simon further contends (90-785 Pet. 20-24) that the district court erred in that portion of the jury

---

[7] Simon suggests that occurrence of the meeting in June was an essential element of the extortion because a vote approving the Loop Drive lease occurred in July. Pet. 30, 32, 34. As the court of appeals noted, however, the Loop Drive lease had not been executed in November, and Simon's help was still needed to complete the transaction. Pet. App. 114-115.

instructions in which it explained the "inducement" element of extortion. Simon argues that that portion of the charge permitted the jury to infer inducement from the receipt of entirely lawful campaign contributions.

The charge at issue was as follows (Pet. App. 133):

> [I]f the defendant repeatedly accepted money or benefits from representatives of Wedtech, and if the amount of money or benefits accepted could reasonably have affected the defendant's exercise of his duties, then you may find defendant induced the payment of money.

The court of appeals found this language erroneous in the context of this case, explaining why it was inappropriate here, despite the fact that the same language had been approved in another case, *United States* v. *O'Grady*, 742 F.2d 682, 694-695 (2d Cir. 1984) (en banc) (concurring opinions) (Pet. App. 135):

> The *O'Grady* standard, permitting an inference of inducement from repeated acceptance of substantial benefits, makes sense as applied to an appointed official who has no lawful basis for receiving cash or other benefits from those conducting business with his agency. It does not apply, however, to an elected official who may lawfully receive campaign contributions. Permitting an inference of inducement from an elected official's repeated acceptance of substantial benefits would subject every recipient of campaign contributions to conviction for extortion.

The court went on, however, to hold that the instructional error did not require the reversal of Simon's conviction, because "[t]here was no issue put to the jury in Simon's case as to whether any payment was a lawful political contribution or an unlawful extortion or bribe." Pet. App. 137. As the court explained, neither the prosecution nor Simon con-

tended that the Lawrence kickbacks or the job for Bittman were campaign contributions. *Ibid.* To be sure, the government contended that the $50,000 Simon demanded at the Yonkers Raceway was a campaign contribution that Simon extorted. Simon's defense, however, was not that the payment was a lawful contribution but rather that the demand was never made and the money never received on his behalf. *Id.* at 137-138. Furthermore, the court noted, the entire instruction on extortion included language that required a finding that the defendant had acted "unlawfully" and language that defined extortion under color of right as the "misuse" of public office. Pet. App. 138; see Gov't C.A. Br. 248-249. Particularly "[i]n light of the factual issues framed by the parties' contentions, these passages of the jury charge provide adequate assurance that Simon suffered no prejudice by the erroneous inclusion of the 'pattern of benefits' language from *O'Grady*." Pet. App. 138. The court of appeals was therefore correct in determining that, on the facts of this case and in the overall context of the jury instructions, the challenged portion of the charge does not require reversal.[8]

4. Petitioner Simon claims (90-785 Pet. 24-29) that the district court erred in denying without a hearing his motion for a new trial, which was based on a claim of new evidence concerning government witness Sabino Fogliano. This contention is insubstantial.

---

[8] Because the court of appeals found that there was no issue about whether the extorted payments were lawful campaign contributions, this case is unlike *McCormick* v. *United States*, No. 89-1918 (argued Jan. 8, 1991), in which petitioner claimed that particular payments made to him were legitimate campaign contributions. Simon challenges the court of appeals' analysis of the trial record (90-785 Pet. 23), but the court of appeals' reading of the record is well supported and does not merit review.

The newly discovered evidence advanced in support of Simon's new trial motion was that, although Fogliano testified about his own tax evasion and admitted that he had failed to report $600,000 to $800,000 over several years, the full extent of his actual tax evasion was not revealed. After the conclusion of the trial in this case, Fogliano pleaded guilty in New York State court to charges of evading income taxes of $8.5 million. Pet. App. 69-70. Simon argues from this fact that Fogliano lied on the witness stand, that the federal prosecutors probably knew of his perjury, and that, had the jury known the full extent of Fogliano's tax evasion, it may have discounted his testimony and acquitted Simon.

The general standard for granting a new trial based on newly discovered evidence is that the new evidence would probably lead to an acquittal. *United States* v. *Steel*, 759 F.2d 706, 713 (9th Cir. 1985); *United States* v. *Gonzalez*, 748 F.2d 74, 77 (2d Cir. 1984); *United States* v. *Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982). If the new trial motion is based on the use of perjured testimony, however, and the government knew or should have known of the perjury, then a new trial should be granted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); *United States* v. *Petrillo*, 821 F.2d 85, 88 (2d Cir. 1987).

The district court in this case found that petitioner's motion failed under either of these standards. 705 F. Supp. at 864, 865-866. The court observed that the government had notified the defense that Fogliano was a tax evader before trial, that the government brought out Folgiano's tax evasion and the ongoing state investigation on direct examination, and that the defense pursued the tax evasion on cross-examination. *Id.* at 866. The jury thus clearly knew that Fogliano was a tax evader, and that his crime involved

a substantial amount of money. The district court concluded (*ibid.*):

> It is disingenuous to suggest that had the jury known Fogliano was a bigger tax evader than he was made out to be they would have acquitted Simon of the charges against him. Such evidence, had it been adduced at trial, would have been merely "'*additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable;' it could hardly have transformed the jury's image of [the government's witness] from paragon to knave."

The new evidence was cumulative and related only to the impeachment of the witness, rather than to Simon's guilt or innocence. Moreover, there was abundant independent evidence, apart from the testimony of Fogliano, that supported Simon's conviction. Gov't C.A. Br. 204-205. The district court was therefore correct in finding that the new evidence did not warrant a new trial under either standard.[9]

5. Petitioner Mario Biaggi claims (90-931 Pet. 25-31) that the district court's refusal to order the production of certain documents and the issuance of certain trial subpoenas precluded him from presenting his defense. He sought to subpoena several government officials, including Edwin Meese, who had been a White House official at the time Wedtech was awarded its major government con-

---

[9] With regard to Simon's claim that the district court should have held an evidentiary hearing to establish the extent to which the government knew the full amount of Fogliano's tax evasion, the district court found that the claim of government misconduct was entirely speculative, unsupported by any firm evidence, and "wholly insufficient" to require an evidentiary hearing. 705 F. Supp. at 866. Particularly in light of the fact that at the time of trial the state investigation was still in progress, there is no basis for Simon's assertion that the federal prosecutors must have known the exact extent of Fogliano's tax evasion.

tracts, and he sought to obtain documents that would show the involvement of Meese and other officials in obtaining contracts for Wedtech. The "Meese defense" was designed to show that Wedtech already had the aid of senior Republican Executive Branch officials and therefore had no need to bribe a Democratic congressman. Pet. App. 131-133.

The short answer to this contention is that, as the court of appeals explained, petitioner was allowed ample opportunity to present this defense to the jury. The district court's refusal to order production of the requested documents and testimony was well within its discretion to prevent the expansion of an already lengthy trial into cumulative and irrelevant matters. Pet. App. 132. See also 705 F. Supp. at 849. The court of appeals pointed out that the defense was able to establish through the four cooperating witnesses "the considerable role played by Meese in assisting Wedtech in its dealings with the Executive Branch and the substantial payments made to Meese's advisor, lawyer/lobbyist E. Robert Wallach, who received $800,000 and one percent of Wedtech's stock for exercising his influence with Meese." Pet. App. 132. The court of appeals also noted that the prosecution never disputed the allegations of Meese's involvement on behalf of Wedtech. The prosecution argued that Wedtech had unlawfully sought to influence numerous people in both the Executive and Legislative Branches. *Id.* at 132-133. As the district court repeatedly observed, the documents and testimony sought to be compelled by petitioner would at most implicate others in the unlawful dealings with Wedtech; they would not exonerate petitioner. See, *e.g.*, 675 F. Supp. at 811; 674 F. Supp. at 1036-1037.

The handling of discovery requests is generally committed to the discretion of the district court. The record in this case demonstrates that the court did not abuse that discretion in making its rulings and that petitioner suffered no

prejudice to his substantial rights. See *United States* v. *Paiz*, 905 F.2d 1014, 1027 (7th Cir. 1990); *United States* v. *Balk*, 706 F.2d 1056, 1059-1060 (9th Cir. 1983).

6. Petitioner Mario Biaggi also claims error (90-931 Pet. 18-24) in the district court's exclusion of evidence that he asserts would have shown his belief that the Wedtech stock that was issued to his son was in fact his son's property. Specifically, Mario Biaggi proffered the testimony of his daughter-in-law, Richard's wife, that on one occasion Richard offered to use part of the proceeds from sale of the shares of stock to repay a loan from his father. At another time, Richard purportedly offered to make a gift to his father of ten percent of the shares; his father initially declined the offer and agreed to accept the gift only if his accountants could assure him such a transfer would be lawful. Pet. App. 129-130; Gov't C.A. Br. 144.

Mario Biaggi argues that the district court's refusal to allow this testimony deprived him of critical defense evidence; he further argues that the court of appeals departed from its own precedents allowing such state-of-mind evidence when it affirmed the district court's ruling. In fact, as the court of appeals made clear, petitioner himself withdrew his proffer of this evidence, making a tactical decision not to introduce it once he realized that it would open the door to the prosecution's rebuttal evidence showing other occasions on which Biaggi had used his children to mask his own improper transactions. Pet. App. 130. Contrary to petitioner's contention (90-931 Pet. 19 n.3), the record is clear that he disavowed any intention to introduce the evidence. See Gov't C.A. Br. 147-152. As the court of appeals concluded, "[h]aving elected, for understandable tactical reasons, not to press for admission of the evidence to show the Congressman's state of mind, Biaggi cannot complain on appeal about the consequences of his decision." Pet. App. 131.

7. Finally, petitioner Richard Biaggi contends (90-937 Pet. 11-15) that it was error for the district court to find, without holding a so-called *Kastigar* hearing (*Kastigar* v. *United States*, 406 U.S. 441 (1972)), that the government had adequately shown that it did not use the testimony Richard Biaggi gave to a New York state grand jury under a grant of immunity. This claim is incorrect.

The district court explained in a post-trial opinion that it had earlier decided to postpone the *Kastigar* hearing until after trial. After trial, however, the court concluded that the trial had obviated the need for such a hearing. After reviewing Richard Biaggi's immunized grand jury testimony and the trial record, the court found it to be clear that the government's case "was obtained from sources wholly independent of * * * Richard Biaggi's grand jury testimony." 705 F. Supp. at 867. In a thorough discussion of the issue, the court of appeals agreed with the district court that review of the immunized testimony and the trial record fully demonstrated that the government had made no use of Richard Biaggi's immunized testimony. The court emphasized that the charges in this case did not even relate to the immunized testimony. Pet. App. 115-119. No further review of this essentially factual determination is warranted.

As the court of appeals explained, Richard Biaggi's immunized testimony in the state grand jury concerned two episodes of bribery, both involving payments through a company called Portatech, to a General Castellano in the New York National Guard and to Bernard Ehrlich, who was also a general in the National Guard. The charges in this case did not concern the Portatech bribes. Indeed, there was only one brief reference to Castellano in the government's case (described by the court of appeals as "fleeting and inconsequential"), and that reference did not concern any attempt to bribe Castellano. Pet. App. 116-117. Additionally, the government used one Portatech document in

its case (to cross-examine Richard Biaggi's wife about her knowledge of her husband's business dealings), but the document was obtained from Wedtech pursuant to a subpoena issued before Richard Biaggi's grand jury testimony. Pet. App. 117.[10]

In short, the purpose of a *Kastigar* hearing was fully satisfied by the trial court's review of petitioner's grand jury testimony and the entire trial record of this case. From that review, both the district court and the court of appeals were satisfied that the government met its burden of showing that it had not made any use of Richard Biaggi's immunized testimony. That case-specific determination is correct and does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

FEBRUARY 1991

---

[10] Petitioner also argued below that his grand jury testimony was indirectly used against him by providing the motivation for the cooperation of the four Wedtech witnesses who testified for the government. The court of appeals properly rejected that claim. As the court explained, the witnesses were questioned extensively at trial about their motivation for cooperating with the government, and none of them testified they were motivated by anything Richard Biaggi had said to the state grand jury. Pet. App. 118-119.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282 061/20377